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**U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.**

DEPT. OF TRANSPORTATION
DOCKETS

2003 APR 24 P 3:55

IN THE MATTER OF

DHL AIRWAYS, INC.

DOCKET NO. OST-2002-13089 -53
(Citizenship Proceeding)

**MOTION OF DHL AIRWAYS, INC.
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12**

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DATED: April 24, 2003

**Counsel for
DHL AIRWAYS, INC.**

**U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.**

IN THE MATTER OF

DHL AIRWAYS, INC.

DOCKET NO. OST-2002-13089
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April 24, 2003

**MOTION OF DHL AIRWAYS, INC.
FOR CONFIDENTIAL TREATMENT UNDER 14 C.F.R. § 302.12**

DHL Airways, Inc. ("Airways"), pursuant to Rule 12 of the Department's Rules of Practice (14 C.F.R. § 302.12), respectfully requests that the Chief Judge withhold from public disclosure the documents and information that Airways is filing herewith under seal in the above-captioned proceeding.¹ These documents and information contain confidential, proprietary and commercially sensitive information. Airways is submitting these documents and information to facilitate the Department's review of the current citizenship of Airways in the above-referenced proceeding. In support of this request, Airways submits the following:

**I. AIRWAYS' CONFIDENTIAL DOCUMENTS AND INFORMATION ARE
PROTECTED FROM PUBLIC DISCLOSURE BY THE FREEDOM OF
INFORMATION ACT**

In accordance with Order 2003-4-14 and the Order of Chief Administrative Law Judge Yoder entered in this proceeding on April 21, 2003, and to facilitate expeditious processing of

¹ Attached hereto is an index of Airways' confidential materials.

this citizenship review, Airways is voluntarily submitting documents and information that may be relevant to this proceeding including, but not limited to, documents that it has previously submitted to the Department in the course of the Department's informal review of Airways' citizenship. An index of Airways' confidential documents is attached. The documents and information, produced by Airways in consultation with counsel, are confidential and proprietary.

Airways' documents and information are protected from public disclosure under various exemptions to the Freedom of Information Act ("FOIA"), including 5 U.S.C. §§ 552(b)(3) and (b)(4). Exemption 3 protects from disclosure information specifically protected by another federal statute, including 49 U.S.C. § 40115. See British Airports Authority v. CAB, 531 F. Supp. 408, 414 (D.D.C. 1982). Section 40115 states that the Department "shall" withhold from public disclosure, among other things, information that would adversely affect an air carrier's competitive position in foreign air transportation. The documents and information at issue here clearly satisfy this standard. Airways is an air carrier that competes in foreign air transportation. The documents and information contain commercially sensitive information, including Airways' governance structure and shareholder information. Further, this information reveals Airways' strategic intentions and competitive positions. These materials have not been made publicly available. If disclosed, this information could be used by Airways' competitors to their strategic advantage, and Airways' disadvantage, in making competitive decisions.²

² The Department has found that Exemption 3 also applies to information protected by 49 U.S.C. § 46311. See Order 2001-10-2, at 2-3. That statutory provision prohibits the release of information acquired by the Department "when inspecting the records of an air carrier" or information that "is withheld from disclosure under section 40115." 49 U.S.C. § 46311(a). Section 46311 further underscores that Airways' documents and information warrant confidential treatment.

Exemption 4 protects from public disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." Gulf & Western Indus., Inc. v. United States, 615 F.2d 527, 529 (D.C. Cir. 1980) (citations omitted). The documents and information at issue here clearly satisfy this standard. All are commercial or financial in nature; they were obtained from a private citizen; and are privileged or confidential. Airways would suffer substantial competitive harm if the documents were publicly disclosed. See Washington Post Co. v. HHS, 690 F.2d 252, 268 (D.C. Cir. 1982) (defining the standard for whether a document is privileged or confidential). Public disclosure of such information could "impair the Government's ability to obtain necessary information in the future or . . . cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 677-78 (D.C. Cir. 1976) (quoting National Parks & Conservation Ass'n v. Morton, 498 F.2d 765-70 (D.C. Cir. 1974)); Burke Energy Corp. v. DOE, 583 F. Supp. 507, 510-11 (D. Kansas 1984).

II. ACCESS TO AIRWAYS' CONFIDENTIAL AND PROPRIETARY DOCUMENTS SHOULD BE LIMITED TO COUNSEL AND OUTSIDE EXPERTS

Due to the confidential nature of the documents and information Airways is filing herewith and as stated in Order 2003-4-14, Rule 12 access should be limited to eligible counsel and outside independent experts who file an affidavit in advance stating that they will: (1) use the information only for the purpose of participating in this proceeding; (2) not disclose the information to anyone other than counsel or outside experts who have filed a valid affidavit in this docket with the Department; and (3) comply with all restrictions the Department may impose

on copying Airway's confidential materials and any requirements relating to the return or destruction of such copies upon completion of this proceeding.

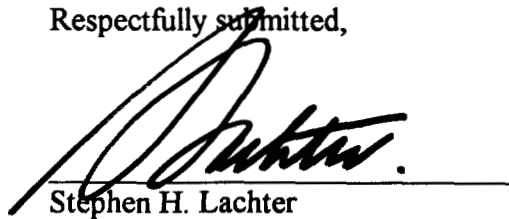
The documents and information Airways has filed under Rule 12 contain highly sensitive commercial information relating to its corporate governance structure and shareholder information. In order to protect Airways' ability to compete effectively, it is imperative that this information not be disseminated to Airways' competitors, even under Rule 12 procedures. In similar recent cases, the Department has routinely limited Rule 12 access to confidential data filed to counsel and outside experts.³ Public disclosure of Airway's confidential materials is not required in the interest of the public because, by limiting access in this manner, the Department can permit parties to fully participate in this proceeding while reducing the risk of competitive harm that would result if the information were disseminated to Airways' competitors.

WHEREFORE, for the foregoing reasons, the Department should grant Airways' motion to withhold from public disclosure the confidential, proprietary and commercially sensitive information that Airways has filed under seal; limit Rule 12 access to counsel and outside

³ See Order 2003-4-14, at 3 n.7, 8.

experts as described above; and grant such other and further relief as the Department deems necessary.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lachter", is written over a horizontal line.

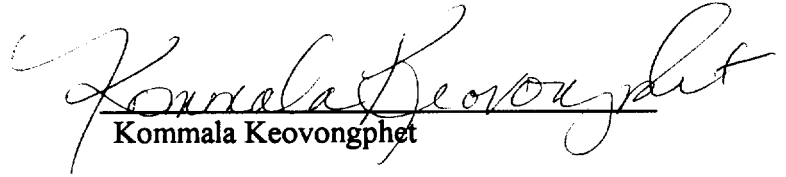
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Counsel for
DHL AIRWAYS, INC.

Dated: April 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have served by 1st class mail, copies of the foregoing Motion of DHL Airways, Inc. for Confidential Treatment Under 14 C.F.R. § 302.12, this 24th day of April, 2003 to all persons named on the Service List.


Kommala Keovongphet

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TRANSMITTAL LETTERS**Tab No.**

1. Letter from Stephen H. Lachter to Randall D. Bennett, September 12, 2000
2. Letter from Stephen H. Lachter to Joseph A. Brooks, November 28, 2000
3. Letter from Stephen H. Lachter to Joseph A. Brooks, December 4, 2000
4. Letter from Stephen H. Lachter to Joseph A. Brooks, December 6, 2000
5. Letter from Stephen H. Lachter to Joseph A. Brooks, December 12, 2000
6. Memorandum from Stephen H. Lachter to Donald Horn, December 20, 2000
7. Letter from Stephen H. Lachter to Joseph A. Brooks, May 3, 2001
8. Letter from Stephen H. Lachter to Joseph A. Brooks, May 4, 2001
9. Letter from Stephen H. Lachter to Colleen Hanley, March 7, 2002
10. Memorandum from Stephen H. Lachter to Colleen Hanley, March 13, 2002
11. Memorandum from Stephen H. Lachter to Colleen Hanley, March 14, 2002

EXECUTED AGREEMENTS**Tab No.**

12. Lease Agreement Between Wilmington Trust Co. and DHL Airways, Inc.
Re: DC-8-73F -- Oct. 24, 1994
13. Guarantee -- April 30, 1999
14. Master Aircraft Lease Between Wilmington Trust Co. and DHL Airways, Inc. -- Oct. 21, 1999
15. Stock Purchase Agreement -- Sept. 27, 2000
16. Certificate of Amended and Restated Articles of Incorporation of DHL Airways, Inc. -- May 8, 2001
17. Amended and Restated Bylaws, May 8, 2001
18. Consent in Writing of the Stockholders (appointing directors) -- May 4, 2001
19. Amended and Restated ACMI Service Agreement between DHL Holdings (USA), Inc. and DHL Airways, Inc. -- May 14, 2001
20. Stockholder's Agreement -- May 14, 2001
21. Subscription Agreement -- May 14, 2001
22. Loan and Security Agreement -- May 31, 2001
23. Security Agreement and Chattel Mortgage -- May 31, 2001
24. Revolving Credit Note -- May 31, 2001
25. Operating Protocol Agreement -- January 1, 2001
26. Services Agreement -- January 1, 2001
27. Bank of America letter Attn: Business Credit - Manager -- signed; dated May 31, 2001
28. Bank of America letter Attn: Devin Mock, VP -- signed; dated May 31, 2001
29. Tax Indemnification Agreement by and between DHL Holdings (USA) Inc. and William A. Robinson -- May 14, 2001
30. Loan Agreement by and between William A. Robinson and DHL Worldwide Express B.V. -- May 14, 2001
31. Second Amended and Restated ACMI Service Agreement -- July 1, 2002

UNEXECUTED AGREEMENTS

Tab No.

- 32. DHL Airways LLC Agreement - draft dated 10/8/00
- 33. Agreement and Plan of Merger -- draft dated 11/8/00
- 34. Operating Protocol Agreement between DHL Worldwide Express, Inc. and DHL Airways -- unsigned; draft dated 12/14/00
- 35. Services Agreement between DHL Worldwide Express, Inc. and DHL corp. and DHL Airways, Inc. -- unsigned; draft dated 12/14/00
- 36. First Amendment to the Stock Purchase Agreement -- unsigned; dated 12/15/00